

CLERK, U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

01/22/02  
FILED

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MICHAEL N. MILBY, CLERK  
BY DEPUTY

*N. J. [signature]*

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MARK NEWBY, et al., Individually : Civil Action No. H-01-3624  
and On Behalf of All Others Similarly : (Consolidated)  
Situating, :  
 : CLASS ACTION  
 :  
Plaintiffs, :  
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 :  
v. :  
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ENRON CORP., et al., :  
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Defendants. :  
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ARTHUR ANDERSEN'S MEMORANDUM OF LAW IN SUPPORT OF  
ENTRY OF ORDER ON MOTION OF THE FLORIDA STATE BOARD  
OF ADMINISTRATION AND THE NEW YORK CITY PENSION FUNDS  
FOR ORDER PROHIBITING THE DESTRUCTION OF EVIDENCE AND  
OTHER RELIEF; AND IN OPPOSITION TO THE EX PARTE  
APPLICATION OF AMALGAMATED BANK FOR  
EXPEDITED DISCOVERY

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Defendant Arthur Andersen LLP (“Andersen”) submits this memorandum of law in support of the entry of an order agreed to by Andersen and Plaintiffs, the Florida State Board of Administration and the New York City Pension Funds, on their motion for an order prohibiting the destruction of evidence and for further relief (the “Order”). A copy of the proposed Order is attached as Exhibit A. The agreed upon Order requires the preservation of Enron-related materials as well as all material related to the destruction or deletion of Enron-related materials, the investigation of the destruction and deletion, and the efforts to recover the deleted or destroyed material. The Order also contains extensive reporting provisions to the Court and the to-be-appointed lead plaintiff and lead counsel and provides lead plaintiff’s expert an opportunity to evaluate the steps being taken by Andersen with respect to preservation and recovery.

Andersen also submits this memorandum in opposition to the ex parte motion of Amalgamated Bank for discovery into the historical events surrounding the document deletion and destruction and the ongoing investigations by United States government agencies on these subjects. This discovery is not directed to aid preservation and restoration, will add nothing to the investigative processes already undertaken, and will interfere with Andersen’s efforts to identify, collect and preserve all necessary materials. To the limited extent that Amalgamated Bank also seeks discovery relating to document preservation, it is redundant of what is already addressed in the Order.

## BACKGROUND

On January 10, 2002, Andersen publicly announced that it had previously advised the Securities and Exchange Commission and the Department of Justice of the disposal in recent months of a “significant but undetermined number of electronic and paper documents and correspondence relating to the Enron engagement.” Andersen also stated that it had begun the process of retrieving documents through electronic backup files.

Following Andersen’s disclosure, the above-named plaintiffs moved in this Court for various forms of extraordinary relief including (1) a document preservation order, (2) discovery regarding the document disposal and Andersen’s efforts to retrieve documents, (3) discovery of Andersen into, primarily, the manner and methods of that destruction and the investigation of that activity and (4) the deposit of all physical documents and copies of all back up tapes in a document depository.

As already discussed, Andersen does not object to the entry of a document preservation order or to providing information regarding the documents deleted or destroyed and the recovery effort. Even before the public announcement concerning the document destruction, Andersen had already begun the process of identifying, collecting, and preserving electronic media, including hard drives, laptops, back-up tapes, servers, PDAs, and disks, much of which could be used to help retrieve and restore the deleted or destroyed documents.

The efforts undertaken to date show that the amount of material involved in this case is massive and perhaps unprecedented. Based both on pre-disclosure work and post-

disclosure efforts to date, Andersen has collected almost 1000 boxes of hard copy documents and tapes containing more than 20 terabytes<sup>1</sup> of data. The data are contained in file back up tapes and, e-mail back up tapes, on servers, hard drives, PDAs, diskettes and other media.<sup>2</sup> Andersen's efforts to identify, collect and segregate all items which contain or may contain Enron-related material remain ongoing. Moreover, Andersen remains cognizant of the need to accomplish this task in a manner that will least compromise the integrity of these materials so that they can be used for forensic analysis in the recovery of files and file fragments.

In addition, while these efforts continue, Andersen continues its cooperation with investigations by the Securities and Exchange Commission, the Department of Justice, several Congressional Committees and other government agencies looking into the Enron collapse. A number of these bodies have indicated that their investigations will probe the disposal of Andersen documents.<sup>3</sup>

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<sup>1</sup>One terabyte equals 1 trillion bytes. Depending upon the application used to create a document, 1 terabyte of data equals between 100 million to 200 million pages.

<sup>2</sup>Not all of the information contained in the tapes collected relates to Enron.

<sup>3</sup>Andersen has announced that it is conducting its own inquiry into the document destruction issues and has announced certain actions taken to date. On January 14, 2002, Andersen announced that "based on preliminary facts relating to [its] inquiry into the disposal of documents related to [its Enron] engagement," it was dismissing "the lead partner on [the] engagement and is placing three other partners responsible for the engagement on administrative leave." The investigation is not complete.



## ARGUMENT

### I

#### THE ORDER ON MOTION OF THE FLORIDA STATE BOARD OF ADMINISTRATION AND THE NEW YORK CITY PENSION FUNDS, AGREED TO BY ANDERSEN, WILL PROTECT THE INTERESTS OF ALL PARTIES AND SHOULD BE ENTERED BY THE COURT

In response to the motions filed, Andersen has agreed with the Florida State Board of Administration and the New York City Pension Funds to a form of order which is attached hereto as Exhibit A. The purpose of the Order is not only to ensure that documents related to the litigations are preserved but also to assure that plaintiffs are informed concerning the document preservation effort, as well as efforts to identify and retrieve or restore destroyed or deleted materials. As a result, the Order provides (in greater detail as set forth therein), that Anderson segregate, preserve and protect all Enron-related materials and also that Andersen preserve all materials relating to the destruction or deletion of any Enron-related materials, the investigation of the destruction or deletion, and the efforts to retrieve or recover any such destroyed or deleted material.

In addition, the Order requires Arthur Andersen to report to the Court and lead plaintiff and counsel, when appointed, on a periodic basis regarding the ongoing efforts to preserve materials; to protect and segregate those materials; to identify the materials that were destroyed; to identify, recover or reconstruct such destroyed or deleted materials; and the results of those recovery efforts.

In addition, Andersen agrees to make its experts available to lead plaintiff's expert to enable lead plaintiff's expert to conduct his/her own evaluation of Arthur Andersen's efforts.

The proposed Order contains additional provisions such that Andersen is not required to take any action that is inconsistent with, will interfere with or will impede any Government investigation; the parties reserve their rights to seek additional information; and no parties' disclosures, whether in the context of reports to the Court and lead plaintiff or in the context of communications between experts, will constitute a waiver of any applicable privilege.

This Order will assure the preservation of documents, while enabling Andersen to continue its recovery efforts and ensuring the Court's and plaintiffs' ability to understand and address any concerns about the process.

## II

### EXPEDITED DISCOVERY BY PLAINTIFF AMALGAMATED BANK SHOULD BE DENIED

The Amalgamated Bank ("Amalgamated") has not agreed to the proposed Order. It argues that it should be allowed to take deposition discovery and that Andersen should be required to deposit copies of collected materials in a depository. Expedited discovery by Amalgamated into past destruction and deletion of Andersen documents, however, will do nothing to aid document retrieval or to preserve existing documents. Andersen has suspended its normal document destruction policy and, as discussed above, agreed to a preservation order, and has already begun to take steps to retrieve files and file fragments. Andersen has also agreed to provide to the Court and the appointed lead plaintiff information relating to these subjects and others and to allow its experts to meet with those retained by the lead plaintiff so that lead plaintiff's expert can evaluate the processes employed in Andersen's efforts.

The preservation of documents and the efforts to retrieve deleted e-mails and electronic files, which is what is – or should be – at issue here, will not be advanced by the discovery Amalgamated seeks.<sup>4</sup> Under the Private Securities Litigation Reform Act (“PSLRA” or “Reform Act”), a party seeking relief from an automatic stay must demonstrate that “particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party” while a motion to dismiss is pending. 15 U.S.C. 78u-4(b)(3)(B). Amalgamated’s stated goal of preserving evidence and making electronic evidence available will already be accomplished with the proposed order discussed above. Thus, Amalgamated fails to meet either standard under the Reform Act: it cannot show that its proposed discovery is necessary to preserve evidence or that it would suffer undue prejudice were such discovery not allowed, nor can it explain why the terms of the stipulated Order are inadequate to prevent undue prejudice. Andersen’s ongoing ability to cooperate with Government investigations and continue its efforts to retrieve deleted and destroyed documents will only be impeded by layering on the duplicative and harassing process that Amalgamated seeks to interject.<sup>5</sup>

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<sup>4</sup>The discovery Amalgamated seeks is directed almost exclusively to the history of the document deletion and destruction, matters that are the subject of Government inquiries. To the very limited extent that Amalgamated seeks discovery of matters regarding the retrieval process, it is redundant of what Andersen has already agreed in Exhibit A to provide to the Court and whoever is appointed lead plaintiff.

<sup>5</sup>While several decisions cited by Amalgamated allow stays of discovery to be partially lifted, they do not contemplate the intrusive measures, such as depositions, that Amalgamated seeks here. Rather, those courts simply allowed plaintiffs to serve preservation subpoenas that would put third parties on notice to retain and preserve their documents. See In re Grand Casinos Sec. Litig., 988 F. Supp. 1270, 1272 (D. Minn. 1997) (“Notably, the Plaintiffs are not asking that discovery be allowed to proceed, either by way of an enforcement of those Subpoenas, or in any other substantive way.”); Vezzetti v. Remec, Inc., 2001 U.S. Dist. LEXIS 10462 at \*9 ) (S.D. Cal. July 23, 2001) (allowing preservation subpoenas directed at non-parties); In re Tyco Int’l Ltd. Sec. Litig.,  
(continued...)



Moreover, Amalgamated's request for a document depository should be denied. Arthur Andersen is segregating and protecting all of the materials relating to this matter as they are collected. Amalgamated has made no showing that there is a threat of disposal of the collected and segregated Enron-related material.<sup>6</sup> The volume of Enron-related material collected by Andersen to date is already massive. The collection process is not complete. The task of analyzing the collected data – as well as other data – remains to be completed. The very process of copying the thousands of tapes so far retrieved, as demanded by Amalgamated, itself creates risks of both the loss of tapes (i.e. physical failure) and degradation of materials that could impair Andersen's ability to retrieve deleted files. These risks caution against such wholesale copying. Indeed it is exactly these types of issues, which lead plaintiff's expert will have an opportunity to discuss and evaluate when meeting with Andersen's expert pursuant to the proposed agreed to Order and why the Order attached as Exhibit A should be entered.

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<sup>5</sup>(...continued)

2000 U.S. Dist. LEXIS 11659 at \*8-\*16 (D.N.H. July 27, 2000) (allowing preservation subpoenas against third parties if sufficiently particularized).

<sup>6</sup>The document depositor cases cited by Amalgamated are inapposite. These merely show that parties can – as they frequently do – create such depositories. There is no reason for the creation of such a depository here. In In re Shell Oil Refinery, 125 F.R.D. 132, 133 (E.D. La. 1989), the parties agreed to place documents in a building near defendant's property; the court does not discuss any particularized need for a depository. And in In re San Juan Dupont Plaza Hotel Fire Litig., 142 F.R.D. 41, 46 (D. P.R. 1992), the court simply observes without comment that a "Joint Document Depository" was in place, without any discussion of how it was established or the rationale for doing so.

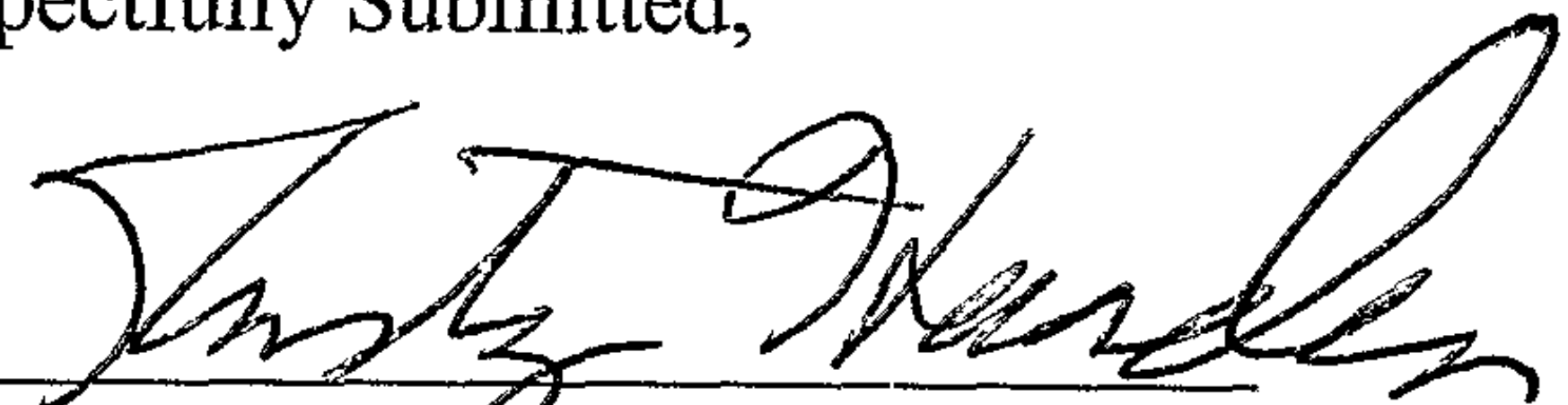


CONCLUSION

For all the reasons set forth above, the Court should enter the proposed order agreed to by Arthur Andersen and Plaintiffs Florida State Board of Administration and the New York City Pension Funds and deny the motion of Amalgamated Bank in its entirety.

Dated: Houston, Texas  
January 21, 2002

Respectfully Submitted,

By: 

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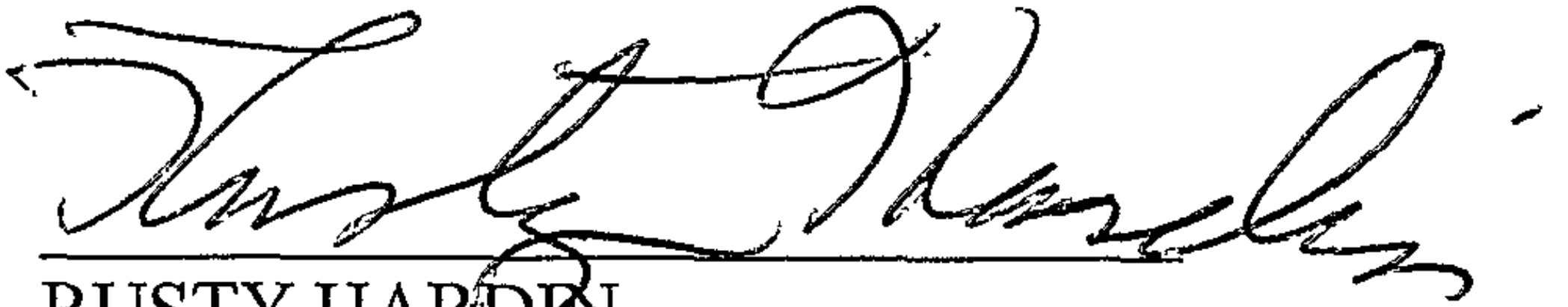
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## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of this Memorandum of Law and Agreed Order have been sent via facsimile to all known counsel of record on the 21<sup>st</sup> day of January, 2002.

  
RUSTY HARDIN

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

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<b>Plaintiff</b>	:	<b>Civil Action No. H-01-3624</b>
	:	<b>(Consolidated)</b>
<b>- v -</b>	:	
	:	<b><u>CLASS ACTION</u></b>
<b>ENRON CORP., et al.,</b>	:	
	:	
<b>Defendants.</b>	:	
	:	
	:	
	X	

**ORDER ON MOTION OF THE FLORIDA STATE BOARD OF ADMINISTRATION  
AND THE NEW YORK CITY PENSION FUNDS FOR ORDER PROHIBITING THE  
DESTRUCTION OF EVIDENCE AND OTHER RELIEF**

IT IS HEREBY ORDERED:

(1) Arthur Andersen shall segregate, preserve and protect all writings, recordings, and electronically stored material (FRE 1001) in its possession, custody or control concerning Enron Corporation for the period 1997 to the present, including but not limited to documents, correspondence, e-mails or other communications or evidence related to audit examinations, quarterly reviews, tax related services, or consulting engagements on behalf of Enron Corporation, or any Enron-related entities.

Enron-related entities shall include Special Purpose Entities and any affiliates, subsidiaries, partnerships, or joint ventures in which, to Arthur Andersen's knowledge, Enron Corporation or any Enron-related entity participated (hereinafter collectively "Enron-related entities") (all such materials and evidence collectively to be referred to as



"Enron-related Materials"). Arthur Andersen shall also preserve and protect all writings, recordings and electronically stored material relating to Arthur Andersen's destruction or deletion of Enron-related materials, to Arthur Andersen's investigation of the destruction or deletion of Enron-related materials by or at the direction of Arthur Andersen employees or agents, and to Arthur Andersen's efforts to recover or reconstruct Enron-related materials which had been previously destroyed, discarded or deleted.

(2) Arthur Andersen shall report to the Court and to whomever is appointed as lead plaintiff(s) and lead counsel, within 20 days of entry of this order the following:

(a) By category or subject matter the Enron-related materials currently in Arthur Andersen's possession, custody or control;

(b) The steps taken to protect, preserve and segregate Enron-related materials;

(c) The efforts undertaken to identify specific Enron-related materials that were destroyed or deleted by document type, category or subject matter as appropriate;

(d) The efforts to find, identify, recover, reconstruct and/or recreate any Enron-related materials which were destroyed or deleted or are otherwise missing from Arthur Andersen's physical or electronic files;

(e) The documents and/or the categories of documents that were destroyed that have now been recovered, reconstructed and/or recreated by electronic means or otherwise, including the current location of such materials and the manner in which such materials were recovered, reconstructed or recreated;

(f) The efforts made to find, identify, recover, reconstruct and/or recreate files in the personal possession of Arthur Andersen's former or present employees.

(3) Arthur Andersen will update the Court and whoever is appointed as lead counsel as to items 2(a)-(f), on a periodic basis, as agreed to by the parties or as ordered by the Court.

(4) Within 10 days of the report referred to in paragraph 2 (or at such other time as the parties may agree), Arthur Andersen will make its expert available to the expert retained by lead plaintiff(s) and lead counsel for the purpose of enabling such expert to conduct his/her own evaluation of Arthur Andersen's efforts with respect to the matters referred to in paragraph 2, above.

(5) Nothing herein shall be construed to require Arthur Andersen to undertake any action that is inconsistent with or will interfere with or impede any governmental investigation.

(6) The rights of all parties to seek additional information are preserved.

(7) Nothing reported by any party pursuant to or in connection with this Order shall constitute a waiver of the attorney client, work product or any other applicable privilege.

AS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Melinda Harmon  
United States District Court Judge

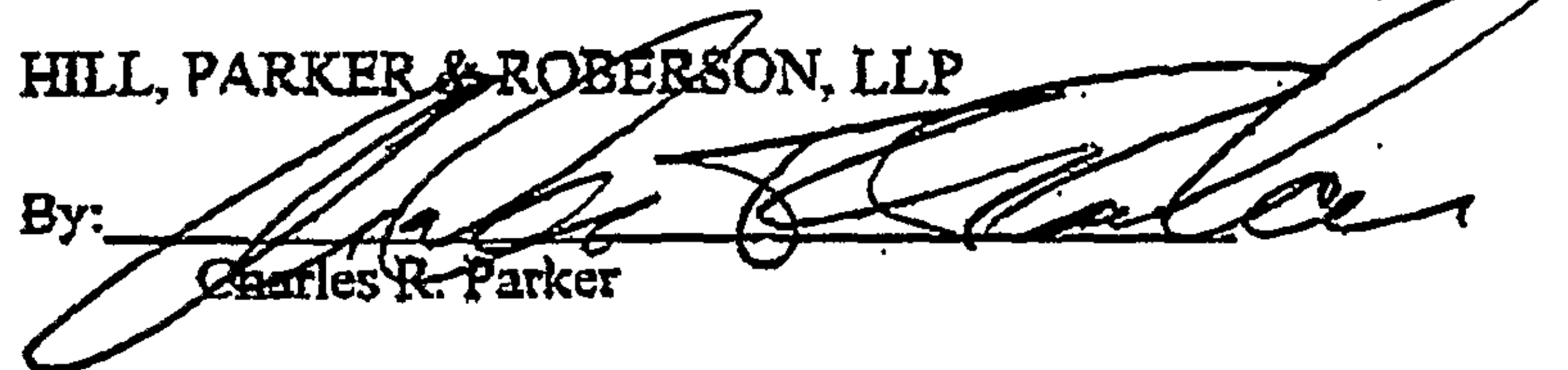
APPROVED AS TO FORM:

Dated:

Jan 21, 2002

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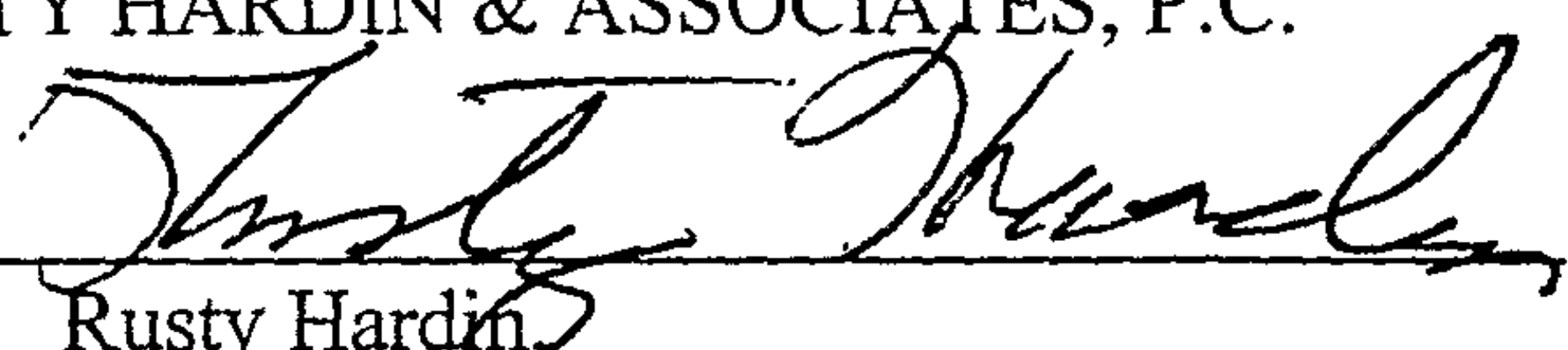
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